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JAMS ARBITRATION

SANTIAGO GEOLOGIC HAZARD ABATEMENT DISTRICT, a political subdivision of the state of California, Claimant, vs. CITY OF ANAHEIM, Respondent.	JAMS Reference No. 1200059076 Hon. Nancy Wieben Stock (Ret.) **CITY OF ANAHEIM'S REPLY ARBITRATION BRIEF (Limited to 5 Pages)** Arbitration Hearing Date: January 30, 2023 Time: 10:00 a.m. (Via Zoom)

I. Declaratory Relief is Inappropriate Because a Determination Will Change Nothing.

This arbitration may well strike the arbitrator as bizarre in that it involves an alleged dispute concerning future events that, but for SGHAD's arbitration demand, would have little or no likelihood of ever manifesting in litigation or arbitration. That is the reason why it is not a case of actual controversy requiring declaratory relief under Code of Civil Procedure section 1060. Providing declaratory relief rewards the filing of litigation when none is necessary. Doing so would be contrary to the public policy that underlies Code of Civil Procedure section1060.

SGHAD has cited multiple cases for the proposition that a public entity cannot be compelled to perform an act or obligation, whether statutory or contractual, involving an expenditure of funds, if it does not affirmatively appear that the public entity has funds available for the purpose. City does not dispute that proposition. Regardless of any breach of contract, City knows that it will not be able to compel SGHAD to perform, if SGHAD has no funds to do so. Accordingly, it is unlikely that a future City Council would pursue an action to compel SGHAD to perform such obligations once SGHAD's funds are actually depleted. The fact that a public entity cannot be compelled to perform a contract, because it lacks the funds to perform, does not mean that the contract itself does not provide for performance. Instead, it means that a Court cannot compel performance of what the contract, by its terms, does require. Inability to compel performance similarly does not mean that the public entity is contractually "excused" from a breach due to impossibility, impracticability or frustration of purpose; doctrines that are based upon the occurrence of unforeseeable and/or unforeseen events. Again, it means that notwithstanding the valid contract and breach, performance cannot be compelled by the courts.

The distinction may be technical, but SGHAD insists on continuing this arbitration in pursuit of this technicality. Claimant's Opening Brief ("COB", p. 25:13-17) quotes *Stonehouse Homes LLC v City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540 as stating: "To determine if a controversy is ripe, a two-pronged test is employed: (1) is the dispute sufficiently concrete that declaratory relief is appropriate and (2) will withholding judicial consideration result in the parties suffering hardship." SGHAD fails to identify the hardship the parties will suffer if declaratory relief does not issue. SGHAD follows the quote by indicating that members of the public (and

City) count on SGHAD to prevent a reactivation of the landslide. They should be advised in a binding legal decision that SGHAD has no legal obligation to operate the Dewatering Facilities when the approximately $380k on hand is expended and that such a day is on the horizon." It is already obvious to everyone that SGHAD cannot operate the Dewatering Facilities if it has no funds. No court or arbitrator needs to tell City, SGHAD or members of the public such a truism. That fact, of course, was made patently clear to SGHAD members when they voted against an assessment. The vote was an expression of those voting to accept the risk of ground movement due to rise in ground water levels, rather than assess themselves to continue to fund SGHAD's operation of the Dewatering Facilities. A determination by the arbitrator that SGHAD is not required to operate the Dewatering Facilities when it has no funds to do so, will change nothing.

II. SGHAD's Implied Condition Argument.

While the inappropriateness of declaratory relief should make it unnecessary to address the merits of SGHAD's contractual interpretation and arguments for being "excused" from contractual performance (based on impossibility, impracticability, and/or frustration of purpose), City will do so in the interest of comprehensiveness.

SGHAD claims that City will contend that the duration of SGHAD's obligation to operate the Dewatering Facilities is perpetual. SGHAD concedes: "In fairness to the City, there is no explicit temporal or other limitation on SGHAD's paragraph 6(a) obligations. Read in isolation, the City might make a good point." (COB, p. 18:22-24.) SGHAD goes on to argue that there must be an implied condition in the Agreement that SGHAD's obligation to operate after depletion of the initial $3.5 million funding was conditioned upon SGHAD's successful passing of an assessment. SGHAD cites *Kessler v. General Cable Corp.* (1979) 92 Cal.App.3d 531, 541 for a purported judicial practice of liberally implying conditions to contracts. *Kessler* hardly stands for such a proposition. In fact, the *Kessler* court rejected the implied condition urged by the plaintiffs in that case. *Kessler* set forth a strict test discouraging the finding of implied conditions, stating:

> It is the law in California that, generally, a strict test is applied in determining whether or not an agreement—or a representation—carries with it an implied covenant or promise, *i.e.*, one not expressed by the parties directly. [Citations omitted.] It has been said that implied covenants are not favored in the law, although some courts have been more liberally inclined than others in interpreting a contract as including implied terms. (See, e.g., *Addiego v. Hill* (1965) 238

> Cal.App.2d 842, 846 [48 Cal.Rptr. 240].) A recent case summarized the conditions under which an implied covenant would be recognized as follows: [I]t has been held that covenants or terms in an agreement may be implied only if the following conditions are met: (1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; and (5) there can be no implied covenant where the subject is completely covered by the contract. (citing *Hinckley v. Bechtel Corp.* (1974) 41 Cal.App.3d 206, 211.)

SGHAD's argument would create an implied condition excusing performance whenever one is unable to perform a contract, whether due to bankruptcy, or because the task exceeds one's abilities. It may not be possible for a court to always compel performance or payment of damages, but the contractual breach remains, even if there is no remedy.

One of the multiple prerequisites for an implied condition is that it can be rightfully assumed that it would have been made if attention had been called to it. The evidence is clear that SGHAD's members and Board were well aware that the $3.5 million would not last indefinitely. Board members asked about this at the initial SGHAD meeting on March 29, 1999 and were told that City had proposed a larger amount of the settlement go to SGHAD but that had been rejected. (Decl. of Michael Rubin, ¶ 11; also see Stipulated Facts #14 at lines 17-23.) At its May 10, 1999 meeting when the Agreement was approved, SGHAD's Board first voted to reject the Agreement due to inadequate funding. (Stipulated Facts #15, also see Ex. 13, Minutes of May 10, 1999 SGHAD Board Meeting, at SGHAD 4084.)

Ironically, SGHAD seeks to exclude evidence of "pre-Delmonico settlement discussions" that are highly relevant to the implied condition issue. Rubin's declaration states that City urged the settlement with plaintiffs include an $8 million allocation towards funding the proposed GHAD but this was rejected by Plaintiffs who would only agree to a maximum $3.5 million of the settlement funds towards the proposed GHAD. This is substantiated by the meeting notes of the Delmonico Plaintiffs' Landslide Committee which were important enough for SGHAD to include in its agenda packages for the 2022 hearings on the proposed assessment. (see Ex. 3, ANA 533-535, and see Ex. 38, SGHAD 4773- 4775.) The relevance is that it was forseeable to SGHAD's property owners (who voted for SGHAD's formation), and to SGHAD's Board (voted to approve

the Agreement), that the $3.5 million was not going to be sufficient to operate the Dewatering Facilities indefinitely, yet they were accepting SGHAD's unqualified obligation to do so.

The current need for an assessment was foreseen. The Agreement's Recital G recites the expectation that SGHAD would not only operate the Dewatering Facilities but "would be responsible for funding" and "to take such other actions as are necessary to prevent reactivation and abate movement of the Santiago Landslide". (Ex. 17, p. 2.) Bona-fide actions to pass an assessment (only belatedly attempted in 2019 and 2022) were SGHAD's known responsibilities.

SGHAD quotes, out of context, text from the Delmonico settlement agreement, (COB, p. 20:1-5) which actually underscores City's point. The quote relates to City's agreed to contractual obligation to operate the Dewatering System if SGHAD is not formed. Under such circumstances, City would use the $3.5 million to operate the Dewatering System, but made it clear that it was not agreeing to do so after the $3.5 million was depleted. It was recognized that the $3.5 million was not sufficient to operate the Dewatering Facilities indefinitely and that City was not promising to do so. No such durational limit can be found in the SGHAD Agreement.

III. Impossibility, Impracticability, and Frustration of Purpose Are Not Applicable Because the Circumstances Were Not Unforeseeable or Unforeseen.

City concedes that it cannot compel a public entity (like SGHAD) to operate the Dewatering Facilities if and when SGHAD's funds are depleted and that mandamus will not issue to compel SGHAD to perform under those circumstances. That does not mean that SGHAD is contractually "excused" from performance - it means that performance cannot be compelled.

None of the three public entity cases cited in SGHAD's opening brief are to the contrary. As set forth in City's opening brief (pp. 16-18), the doctrines of Impossibility, Impracticality, and/or Frustration of Purpose cannot serve as grounds to excuse performance by SGHAD because it was foreseeable that SGHAD would run out of funds absent approval of an assessment. In *Superior Court v. County of Alameda* (2021) 65 Cal.App.5th 838, the County/Sheriff argued that their MOU with the Court did not require them to fund services beyond the State's level of funding. The trial court agreed, but the Court of Appeal disagreed and determined that the MOU required their performance, whether or not the State's funding was exceeded. The case was

remanded to adjudicate the County/Sheriff's fact intensive "impracticability" defense. There was no issue of forseeability inasmuch as the County/Sheriff never anticipated having to provide services beyond the State's funding (nor was the defense even adjudicated at the trial level).

Sutro Heights Land Co. v. Merced Irrigation Dist. (1931) 211 Cal. 670 dealt with a statute, not a contract, and addressed whether the statute required the irrigation district "to work its own destruction by undertaking to provide drainage facilities for the district, the expense of which is beyond its financial ability to meet or pay for." (*Id.* at 703.) The court in *Sutro* determined this was never intended by the statute (contractual foreseeability was not an issue).

Board of Supervisors v. McMahon (1990) 219 Cal.App.3d 286 also dealt with a statute, not a contract, and therefore forseeability was never an issue.

IV. Conclusion.

SGHAD concedes that it was not even planning to attempt an assessment in 2022, but did so because of the City's defenses to the arbitration (COB, 14:27-15:5.) While that proposed assessment was not successful, the reasons for that may change before SGHAD's funds are depleted. SGHAD's only justification for this arbitration is "to put all interested parties on notice that SGHAD has been formally relieved of its contractual duties, preclude City from suing SGHAD for breach of contract, and put to rest the uncertainties arising from the faulty Agreement." (COB, p. 28:2-4.) City has never threatened to sue SGHAD for breach of contract or anything else (and SGHAD has not even alleged to the contrary). This case represents litigation to avoid litigation that is highly unlikely to ever occur. SGHAD cannot show how declaratory relief will assist the parties to conform their conduct to the law or to prevent future litigation. It fails the tests for awarding declaratory relief set forth by the California Supreme Court in *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634 (see City's Opening Brief at pp. 10-13.)

Respectfully submitted,

Dated: January 27, 2023

RUTAN & TUCKER, LLP
MICHAEL RUBIN

By: _____
Michael Rubin
Attorneys for Respondent, City of Anaheim

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18575 Jamboree Road, 9th Floor, Irvine, CA 92612. My electronic notification address is mmartinez@rutan.com.

On January 27, 2023, I served on the interested parties in said action the within:

CITY OF ANAHEIM'S REPLY ARBITRATION BRIEF (Limited to 5 Pages)

as stated below:

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☒ (BY ELECTRONIC TRANSMISSION VIA JAMS ACCESS) by transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

Executed on January 27, 2023, at Irvine, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Marisol Martinez	/s/ *Marisol Martinez*
(Type or print name)	(Signature)